M.R.O. 14—10,000—21-4-22.

MADRAS RECORD OFFICE.

Government of Madras.

Revenue **DEPARTMENT.**

G.O. No. 1777-B Press ~~Mis.~~

89-A—89B

Dated 27—12—1859.

Not to be folded or roughly handled

No. 89 A. Read the following letter from CLEMENT DALE, Esq., Government Pleader, Sadr Adálat; to J. D. BOURDILLON, Esq., Secretary to Government, dated 24th December 1859, No. 155.

Letter from Government Pleader to Government, 5th June 1858, *No.* 53.
Do. *Do.* *28th July* 1858, *No.* 85.
Minutes Consultation, 13th August 1858, *No.* 1136, *Revenue Department.*
Minutes Consultation 27th November 1858, *No.* 1591, *Revenue Department.*

Paragraph 1. In continuation of the letters I had the honor to address to Government and the Extract from the Minutes of Consultation respectively noted in the margin; the latter authorizing an appeal to Her Majesty in Council, against the decree passed by the Sadr Adálat in A. S. Nos. 103 and 136 of 1857, dated the 8th May 1858, declaring that the Mootah of Vissannapettah did not escheat to the Crown, it being a Brahmincal estate; I now do myself the honor of enclosing for transmission to England a letter I have addressd to the Right Honorable the Secretary of state for India in Council; as directed by the Extract from the Minutes of Consultation likewise noted in the margin.

2. From a letter addressed to me by the Board of Revenue, and from subsequent enquiries made at the Court of Sadr Adálat, I find that the transcript of the record in those suits was transmitted by the Registrar of the Sadr Adálat some mails since; and by some oversight notice of its transmission was omitted to be given to me; I cannot, however, say that my department is free from blame in the matter, as enquiries ought to have been made from time to time; I have, however, the honor to state, that agreeably with the directions given in the Minutes of Consultation of the 27th November 1858, I prepared the draft of my letter to the Secretary of State and to Government in anticipation, from a great pressure of business in the Sadr Adálat the record in this case was not completed for many months, and in that interval I was under the necessity of twice changing my Gumashta, and in consequence the case escaped attention; of course if notice had been given to me from the Sadr Adálat that the record was ready for transmission, this oversight could not have occurred, no inconvenience, however, can arise from the circumstance, but nevertheless I very much regret its occurrence.

From CLEMENT DALE, Esq., Government Pleader in the Court of Sádr Adálat at Madras; to the Right Honorable the Secretary of State for India in Council, dated 24th December 1859, No. 154.

Paragraph 1. I do myself the honor of informing you that by a former mail was forwarded by the Registrar of the Court of Sádr Adálat at this Presidency, to the Registrar of Her Majesty's Privy Council, Whitehall, certified copies of the transcript records of cross Appeal Suits, Nos. 103 and 136 of 1857.

2. The appeal to Her Majesty in Council has been made under orders from this Government, as notified in the Extract from the Minutes of Consultation of date and number noted in the margin.

Minutes Consultation of the Madras Government 13th Augt. 1858, No. 1136 Revenue Department.

3. On this subject I had the honor to address this Government, in letters dated the 21st of April 1858, No. 36, and the 5th of June 1858, No. 53.

4. The Government claim the property in question as an escheat to the Crown; the last Zamíndár one Varegouda Ramanapah, having died without natural heirs.

5. On the appeal suit first coming on for argument before the Sádr, the counsel for Cavaly Vencata Narrainappah (the appellant in A. S. No. 103 of 1859 and who claimed the right to commence) asserted, that it being the estate of a Hindoo of the Brahmin caste, the property could never escheat to the Sovereign power. I shewed to the Court, that it was not pleaded either in the Lower Court or in their Court, that Varegouda Ramanapah was a Brahmin, that in fact the question was never mooted; the Court, however, referred to the questions propounded to the Pundits, as set out in the 8th paragraph

of the Civil Judge's decree, where the word "Brahmin" is introduced, in a parenthesis, in alluding to the Hindoo widow, and required me to admit the fact; this I declined to do and insisted that the Court must be guided by the pleadings, which were silent on the point. I shewed that the defence as raised by the pleadings, was really and in fact founded on the advances by the defendant's father, &c., to the widow of Varegouda Ramanapah having been made (as was alleged) for the discharge of the Peishcush and other liabilities incurred on account of the estate; as also on a suit No. 18 of 1838, instituted against the widow, ostensibly for the purpose of enforcing payment of such advances, but which was adjusted by the widow giving a Razeenamah; and that the defendant in his defence, as raised by the pleadings, relied on the subsequent proceedings in that suit, and his alleged rights under that Razeenamah, I further shewed, that the answer certainly traverses the attachment of the estate by the Collector as an *escheat*;—and denies that the title of the Government is paramount to that of the defendant, averring that the widow had authority under Hindoo law to alienate or incumber the Zamíndári in perpetuity, and beyond her own life, as against those entitled to the Zamíndári next in possession, and that on her death (if not incumbered or alienated) it would have vested *in her heirs*; and that "the "estate is of such a nature as could under no circumstances escheat to Government, the order "of succession to such property being expressly pointed out by Hindoo law." I further shewed to the Court, that in his answer to the Collector's petition of appeal, after setting out the same grounds of defence, as to the power of the widow to alienate or incumber, the defendant submits, "that by Hindoo law, Government cannot under any circumstances claim the pro- "perty in question as an escheat;" but that in no part of the pleadings in the Lower Court, was the issue of Brahmin or no Brahmin raised; and that consequently no evidence of that fact had been (nor could have been) given; moreover, that in the Sádr the point had not been raised, and if it had, it would have been irregular, and not competent for the Court to have entertained it, raised for the first time in the Court of Appeal.

7. Under such pleadings as I have described, however, and simply because the word "Brahmin" had been introduced by the Civil Judge into a question proposed by him to the Pundits, the Court of Sádr Adálat decided on entertaining the question whether Varegouda Ramanapah was a Brahmin. The counsel for the defendant felt naturally, that the Privy Council would not be likely to view such pleadings through a similar medium, and pressed that the Court should make a declaration, that Varegouda Ramanapah was a Brahmin, I resisted this, and the Court (doubtless feeling that such a step would assuredly lead to their decree being overruled if adverse to Government) were not prepared to go that length, but determined to adjourn the case for a fortnight, requiring me to ascertain the fact in the interval.

8. I did ascertain from the Collector that the Varegouda Ramanapah was in fact a Brahmin; and considering that no advantage could accrue to Government, by my not admitting the fact, I did on the 5th of May 1858 inform the Court that I had no objection on behalf of the Collector to admit "that the late Varegouda Ramanapah the last Zamíndár who died in 1810 was a Brahmin, but not of the sacerdotal class or order;" this admission was accepted by the counsel for the defendant; and (as I understand) entered on the record.

9. The case was argued on a subsequent day (the 8th of May 1858,) when the Court dismissed both Appeals with costs, on the ground that the Crown cannot succeed to the property of a Brahmin.

10. I subsequently gave the subject much consideration, and although the decision may be deemed to be in accordance with the texts in the Dhaya Bhaga and Mitacshara, which were quoted by the counsel for Cavaly Vencata Narrainappah, if construed literally, as also with the law as laid down in the 1st volume of Sir Thomas Strange's work, page 149. I must say that I am of opinion that a dictum, (as there laid down) given in such general and uncertain terms; containing a position that it is not possible can be ever carried out, or enforced; that is opposed to reason; and is so manifestly absurd; is far "too comprehensive;" and I agree with Mr. Norton when he says, he "can scarcely suppose, that the Courts would seek to uphold, or en- "force such a proposition to the present day;" and being of opinion, that the Court of Privy Council will hold that such a dictum, if to be construed literally, cannot be upheld as law, and that from its very uncertainty, it is void, unless a reasonable solution of it can be arrived at, I advised the Appeal to Her Majesty in Council.

11. I will proceed to shew, and I trust successfully, that a reasonable solution can be arrived at; and that such would be also in conformity with Hindoo law; for Vrihaspati (see 2nd Digest 128) writes, "a decision must not be made solely by having recourse to the letter of "written codes; since, if no decision were made, according to the *reason* of the law, there might "be a failure of justice."

12. In Sir Thomas Strange's work, volume 1, pages 309 and 310, after shewing how the payment of debts can be enforced, and the course to be pursued in the case of a defendant having no effects to satisfy a judgment he adds, "a Brahmin can only be compelled to pay accord- "ing to his income by little and little. But in this, and in every case of exemption in favor of "the Brahmin, one of the Sacerdota class is intended, all being borne capable of that class, "but few comparatively speaking belonging to it; the rest being secular Brahmins, pursuing "various worldly pursuits permitted to them by the law. The Sacerdotal learned Brahmin, "has indeed various exemptions, extending to capital punishment, but their number has pro- "bably in all time rendered their claim an evil of no great importance" &c., and in the 2nd vol. page 247, when observing on the opinion of Bombay Pundits, where it is laid down in general terms that "the Magistrate shall never take the property of a Brahmin," and with reference to the case there under cosideration adds, "the Magistrate must cause it to be expended in performance of his funeral rites;" Mr. Ellis remarks, "the law referred to," applies to a REAL BRAHMIN, not to one merely reputed as such. To ascertain what a real one is, see the "Mitacshara and 2nd Digest 127." The Mitacshara in treating on the succession of strangers, upon failure of the kindred, (page 353) after deferring, the preceptor, the disciples, or the fellow students, as the parties to succeed to those dying without kinsmen, proceeds to quote the texts of Gantama, that "Venerable Priests should share the wealth of a Brahmana who leaves no issue;" and of Menu, that "on failure of all those, the lawful heirs are such Brahmanas as have "read the three Vedas, as are pure in body and mind, as have subdued their passions" and then concludes "never shall a King *take* the wealth of a PRIEST;" and as his authority, quotes Menu, "the property of a *Brahmana* shall never *be taken* by the King;" as also Nared a, "if there be no heir of a Brahmana's wealth, on his demise, it must be GIVEN to a Brahmana "otherwise the King is tainted with sin." (In a note it is, however, stated that this passage is not found in the institutes of Nareda). In the 3rd Digest, page 557, is the following commentary on Menu's text, "the other classes, other than the sacerdotal tribe, namely, the military class and the rest, the wealth of a Brahmana must never be *taken* by the King, consequently on failure of honest Brahmanas, HE must *give* the property of a PRIEST to Brahmana's, in general; such is the notion of Cullucabhatta, "the wealth of other classes, in default of heirs, including "kinsmen, sprung from the same branch of a venerable stock, the King should GIVE to honest "Brahmanas, on failure of them, he may take it himself as an escheat; such is the opinion of "Jimútávahana. But Misra and the rest hold, that the first text of Menu relates to the property "of Brahmanas; but the wealth of Cshatriyas and the rest shall be *taken* by the King alone; "such being the rule of decision, why may he not likewise take the estate of a Priest? To ob- "viate this doubt, the Legislator first ordains, that the property of a Brahmana shall not be "*seized* by the Sovereign, accordingly Bandhayana declares, the taking of holy property repre- "hensible in a King;" again "(quoting Bandhayana) that holy property unduly appropriated "destroys like the most exalted poison" adds "therefore, the King shall on no account TAKE the "property of a Brahmana" and (in page 538) is the following commentary "must it not be af- "firmed, that this text shews it highly *reprehensible* to take wealth from a Brahmana by force, "fraud, or the like, but not so to take it without violence as an escheat? No; for the text of "Dévala is explicit." And then quotes Dévala, "in every case the King may take the wealth "of a subject dying without an heir, except the estate of *a Priest* for the property of a Brah- "mana dying without an heir must be GIVEN to learned Priests" and in page 539, quoting Sancha and Lichita says "the property of a learned Priest descends to Brahmanas, not to the King, wealth consecrated to the gods, or allotted *to Priests* must not be seized by the Sovereign." And in the commentary on that text is the following, "The property consecrated *to the gods*, or al- "lotted *to Priests*, must on no account be taken by the King, unless as a fine, or the like; the "seizure of a Brahmana's property being forbidden in these texts, on whom shall the estate of

" a Brahmana devolve ? This question arising, and the words of Dévala bearing the same import, " the text of Menu must relate to the sacerdotal class only."

13. Sir Thomas Strange does not refer to any authority in support of his text in page 310, Mr. Ellis, however, would appear to support Sir Thomas Strange's view, that it must be a Brahmin of the sacerdotal class. The Digest offers a similar construction ; while the Mitacshara, to which Mr. Ellis refers, expressly states the King shall not *take* the wealth of a *Priest*. This view is, moreover, supported by some of the texts I have quoted from the Digest.

14. I am of opinion that the true construction to be put upon the texts quoted, is, that under Hindu law, it is sinful in the King to retain the property of a Brahmin of the sacerdotal order ; and therefore, to avoid sin HE is to GIVE it to learned Priests. If this be the correct construction, it follows that by Hindu law the property of Brahmanas of the sacerdotal class, who shall die without any heirs, as of right belongs to, or vests in, the King ; but with the denouncement that (under Hindu law) he will commit sin if he retains it, and does not *give* it to learned Priests. In the Bombay case, to which I have referred, it is evident that " the Magistrate" TOOK the estate of the deceased Brahmin, for the Pundit proceeds to shew the manner in which the law (Hindu) required HIM to dispense it.

15. The other points arising in the case were not argued, I however, entertain no doubt upon them, and that, had it been decided that the exemption claimed on behalf of the defendant, in consequence of Varegouda Ramanapah having been of the Brahmin caste, did not apply on those other points, the law is clearly in favor of the plaintiff's case.

16. On a careful consideration of the point raised by the defendant, and on which the Court of Sádr Adálat has decided the suits, I am of opinion ;—

1st.—That the texts quoted by the defendant, cannot be upheld as law, if they are to be read literally as claimed by the defendant's counsel.

2nd.—That according to the true construction of those texts, the exemption can only be claimed where the estate was owned by a Brahmin of the sacerdotal class, which Veregouda Ramanapah was not, and consequently that the estate can be claimed as an escheat by Government.

And

3rdly.—That in cases of estates, the last possessor whereof was a Brahmin of the sacerdotal class and who dies without heirs, that the estate (by Hindu law) would devolve on the Sovereign power : but that (if such Sovereign were a Hindu) it would be sinful for the Sovereign to retain such estate ; Hindu law enjoining such Sovereign to GIVE the estate to learned *Priests ;* hence it follows (if my opinion be well founded) that the defence failed ; while the claim put forward on behalf of Government was established ; and that the decree should have been far the plaintiff ; the power of selection, to whom the estate should be given, by the Sovereign, (if a Hindu) would be vested in such Sovereign, and no Municipal Court has the power to interfere with such selection.

17. I think it right to draw attention to the order passed by the Court of Sádr Adálat under date the 21st October 1854. By the course there adopted by the Court, the parties have been placed in false positions. It is clear that the defendant has no right to the estate, (whoever else may be entitled) but from his being defendant, such wrongful possession will be maintained, if the Privy Council should hold that the Crown is not entitled to take by escheat.

No. 89. B. ORDER THEREON, 27th December 1859, No. 1777 B.

Ordered to be forwarded to the Secretary of State.

(Signed) J. D. BOURDILLON,
Secretary to Government.

Catalogue: 23d Dec/59 No 1755-
" Consn: 30th Nov/58 " 36-37.

Copy in a letter from England
27th December 1859 No 86

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No 89 & 89 B.

Rec'd sent to the Secretary of State for India
27th Dec/59 No 86.

Revenue 1859 Dept
Recd 31st Dec No 2450
From Govt Pleader Madras
To Secretary to Govt

Dated 24th December 1859
Recd 27

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No 155
(With an Inclosure)

From Do 7 21st Feby
1860 C No 397 & Cons 29th Oct 51-52
From Do 21st Septr/60 C No 2044.
& Cons 26-Oct 464-465

Forwarding a letter to the address of the Secretary of State, regarding the appeal made to Her Majesty's Privy Council in the case of Visvanapettah & Muttah. —

With an order

No 1777B

Ordered to be forwarded
to the Secretary of State.
27th December
1859.